UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. LARRY HOUSEHOLDER and MATTHEW BORGES, Defendants.	))))))))))	Case No. 1:20-cr-77 Judge Timothy S. Black **DEFENDANTS LARRY HOUSEHOLDER'S AND MATTHEW BORGES'S PROPOSED JURY INSTRUCTIONS**

Defendants Larry Householder and Matthew Borges submit their proposed jury instructions pursuant to the Court's Trial Order. They are prepared to submit additional or alternative instructions on any aspect of this case should the Court or the circumstances so require. And they further request leave to file any supplemental instructions, to the extent necessary and proper.

Dated: January 4, 2023

Respectfully submitted,

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Counsel for Defendant Larry Householder

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1. Introduction

A. Charge:

(1) Members of the jury, now it is time for me to instruct you about the law that you must follow in deciding this case.

(2) I will start by explaining your duties and the general rules that apply in every criminal case.

(3) Then I will explain the elements, or parts, of the crime that the defendant is accused of committing.

[(4) Then I will explain the defendant's positions.]

(5) Then I will explain some rules that you must use in evaluating particular testimony and evidence.

(6) And last, I will explain the rules that you must follow during your deliberations in the jury room, and the possible verdicts that you may return.

(7) Please listen very carefully to everything I say.

B. Authority:

Sixth Circuit Pattern Criminal Jury Instructions, 2021 Edition, Section 1.01.

2. Jurors' Duties

A. Charge:

(1) You have two main duties as jurors. The first one is to decide what the facts are from the evidence that you saw and heard here in court. Deciding what the facts are is your job, not mine, and nothing that I have said or done during this trial was meant to influence your decision about the facts in any way.

(2) Your second duty is to take the law that I give you, apply it to the facts, and decide if the government has proved the defendant guilty beyond a reasonable doubt. It is my job to instruct you about the law, and you are bound by the oath that you took at the beginning of the trial to follow the instructions that I give you, even if you personally disagree with them. This includes the instructions that I gave you before and during the trial, and these instructions. All the instructions are important, and you should consider them together as a whole.

(3) The lawyers have talked about the law during their arguments. But if what they said is different from what I say, you must follow what I say. What I say about the law controls.

(4) Perform these duties fairly. Do not let any bias, sympathy or prejudice that you may feel toward one side or the other influence your decision in any way.

B. Authority:

Sixth Circuit Pattern Criminal Jury Instructions, 2021 Edition, Section 1.02.

3. Presumption of Innocence, Burden of Proof, Reasonable Doubt

A. Charge:

(1) As you know, the defendants have pleaded not guilty to the crimes charged in the indictment. The indictment is not any evidence at all of guilt. It is just the formal way that the government tells a defendant what crime he is accused of committing. It does not even raise any suspicion of guilt.

(2) Instead, the defendants start the trial with a clean slate, with no evidence at all against them, and the law presumes that they are innocent. This presumption of innocence stays with them unless the government presents evidence here in court that overcomes the presumption, and convinces you beyond a reasonable doubt that they are guilty.

(3) This means that the defendants have no obligation to present any evidence at all, or to prove to you in any way that they are innocent. It is up to the government to prove that they are guilty, and this burden stays on the government from start to finish. You must find the defendants not guilty unless the government convinces you beyond a reasonable doubt that they are guilty.

(4) The government must prove every element of the crime charged beyond a reasonable doubt. Proof beyond a reasonable doubt does not mean proof beyond all possible doubt. Possible doubts or doubts based purely on speculation are not reasonable doubts. A reasonable doubt is a doubt based on reason and common sense. It may arise from the evidence, the lack of evidence, or the nature of the evidence.

(5) Proof beyond a reasonable doubt means proof which is so convincing that you would not hesitate to rely and act on it in making the most important decisions in your own lives. If you are convinced that the government has proved the defendants guilty beyond a reasonable

doubt, say so by returning guilty verdicts. If you are not convinced, say so by returning not guilty verdicts.

B. Authority:

Sixth Circuit Pattern Criminal Jury Instructions, 2021 Edition, Section 1.03.

4. Evidence Defined

A. Charge:

(1) You must make your decision based only on the evidence that you saw and heard here in court. Do not let rumors, suspicions, or anything else that you may have seen or heard outside of court influence your decision in any way.

(2) The evidence in this case includes only what the witnesses said while they were testifying under oath; the exhibits that I allowed into evidence; [the stipulations that the lawyers agreed to]; [and the facts that I have judicially noticed].

(3) Nothing else is evidence. The lawyers' statements and arguments are not evidence. Their questions and objections are not evidence. My legal rulings are not evidence. And my comments and questions are not evidence.

(4) During the trial I did not let you hear the answers to some of the questions that the lawyers asked. I also ruled that you could not see some of the exhibits that the lawyers wanted you to see. And sometimes I ordered you to disregard things that you saw or heard, or I struck things from the record. You must completely ignore all of these things. Do not even think about them. Do not speculate about what a witness might have said or what an exhibit might have shown. These things are not evidence, and you are bound by your oath not to let them influence your decision in any way.

(5) Make your decision based only on the evidence, as I have defined it here, and nothing else.

B. Authority:

Sixth Circuit Pattern Criminal Jury Instructions, 2021 Edition, Section 1.04.

5. Consideration of Evidence

A. Charge:

(1) You are to consider only the evidence in the case. You should use your common sense in weighing the evidence. Consider the evidence in light of your everyday experience with people and events, and give it whatever weight you believe it deserves. If your experience tells you that certain evidence reasonably leads to a conclusion, you are free to reach that conclusion.

(2) In our lives, we often look at one fact and conclude from it that another fact exists. In law we call this an "inference." A jury is allowed to make reasonable inferences, unless otherwise instructed. Any inferences you make must be reasonable and must be based on the evidence in the case.

(3) The existence of an inference does not change or shift the burden of proof from the government to the defendant.

B. Authority:

Sixth Circuit Pattern Criminal Jury Instructions, 2021 Edition, Section 1.05.

6. Direct and Circumstantial Evidence

A. Charge:

(1) Now, some of you may have heard the terms "direct evidence" and "circumstantial evidence."

(2) Direct evidence is simply evidence like the testimony of an eyewitness which, if you believe it, directly proves a fact. If a witness testified that he saw it raining outside, and you believed him, that would be direct evidence that it was raining.

(3) Circumstantial evidence is simply a chain of circumstances that indirectly proves a fact. If someone walked into the courtroom wearing a raincoat covered with drops of water and carrying a wet umbrella, that would be circumstantial evidence from which you could conclude that it was raining.

(4) It is your job to decide how much weight to give the direct and circumstantial evidence. The law makes no distinction between the weight that you should give to either one, or say that one is any better evidence than the other. You should consider all the evidence, both direct and circumstantial, and give it whatever weight you believe it deserves.

B. Authority:

Sixth Circuit Pattern Criminal Jury Instructions, 2021 Edition, Section 1.06.

7. Credibility of Witnesses

A. Charge:

(1) Another part of your job as jurors is to decide how credible or believable each witness was. This is your job, not mine. It is up to you to decide if a witness's testimony was believable, and how much weight you think it deserves. You are free to believe everything that a witness said, or only part of it, or none of it at all. But you should act reasonably and carefully in making these decisions.

(2) Let me suggest some things for you to consider in evaluating each witness's testimony.

(A) Ask yourself if the witness was able to clearly see or hear the events. Sometimes even an honest witness may not have been able to see or hear what was happening, and may make a mistake.

(B) Ask yourself how good the witness's memory seemed to be. Did the witness seem able to accurately remember what happened?

(C) Ask yourself if there was anything else that may have interfered with the witness's ability to perceive or remember the events.

(D) Ask yourself how the witness acted while testifying. Did the witness appear honest? Or did the witness appear to be lying?

(E) Ask yourself if the witness had any relationship to the government or the defendant, or anything to gain or lose from the case, that might influence the witness's testimony. Ask yourself if the witness had any bias, or prejudice, or reason for testifying that might cause the witness to lie or to slant the testimony in favor of one side or the other.

[(F) Ask yourself if the witness testified inconsistently while on the witness stand, or if the witness said or did something (or failed to say or do something) at any other time that is inconsistent with what the witness said while testifying. If you believe that the witness was inconsistent, ask yourself if this makes the witness's testimony less believable. Sometimes it may; other times it may not. Consider whether the inconsistency was about something important, or about some unimportant detail. Ask yourself if it seemed like an innocent mistake, or if it seemed deliberate.]

(G) And ask yourself how believable the witness's testimony was in light of all the other evidence. Was the witness's testimony supported or contradicted by other evidence that you found believable? If you believe that a witness's testimony was contradicted by other evidence, remember that people sometimes forget things, and that even two honest people who witness the same event may not describe it exactly the same way.

(3) These are only some of the things that you may consider in deciding how believable each witness was. You may also consider other things that you think shed some light on the witness's believability. Use your common sense and your everyday experience in dealing with other people. And then decide what testimony you believe, and how much weight you think it deserves.

B. Authority:

Sixth Circuit Pattern Criminal Jury Instructions, 2021 Edition, Section 1.07.

8. Number of Witnesses

A. Charge:

(1) One more point about the witnesses. Sometimes jurors wonder if the number of witnesses who testified makes any difference.

(2) Do not make any decisions based only on the number of witnesses who testified. What is more important is how believable the witnesses were, and how much weight you think their testimony deserves. Concentrate on that, not the numbers.

B. Authority:

Sixth Circuit Pattern Criminal Jury Instructions, 2021 Edition, Section 1.08.

9. Lawyers' Objections

A. Charge:

(1) There is one more general subject that I want to talk to you about before I begin explaining the elements of the crime charged.

(2) The lawyers for both sides objected to some of the things that were said or done during the trial. Do not hold that against either side. The lawyers have a duty to object whenever they think that something is not permitted by the rules of evidence. Those rules are designed to make sure that both sides receive a fair trial.

(3) And do not interpret my rulings on their objections as any indication of how I think the case should be decided. My rulings were based on the rules of evidence, not on how I feel about the case. Remember that your decision must be based only on the evidence that you saw and heard here in court.

B. Authority:

Sixth Circuit Pattern Criminal Jury Instructions, 2021 Edition, Section 1.09.

10. Defining the Crime and Related Matters – Introduction

A. Charge:

(1) That concludes the part of my instructions explaining your duties and the general rules that apply in every criminal case. In a moment, I will explain the elements of the crime that the defendants are accused of committing.

(2) But before I do that, I want to emphasize that the defendants are only on trial for the particular crime charged in the indictment. Your job is limited to deciding whether the government has proved the crime charged.

[(3) Also keep in mind that whether anyone else should be prosecuted and convicted for this crime is not a proper matter for you to consider. The possible guilt of others is no defense to a criminal charge. Your job is to decide if the government has proved the defendants guilty. Do not let the possible guilt of others influence your decision in any way.]

B. Authority:

Sixth Circuit Pattern Criminal Jury Instructions, 2021 Edition, Section 2.01.

11. Separate Consideration – Multiple Defendants Charged with a Single Crime

A. Charge:

(1) The defendants have all been charged with one crime. But in our system of justice, guilt or innocence is personal and individual. It is your duty to separately consider the evidence against each defendant, and to return a separate verdict for each one of them. For each defendant, you must decide whether the government has presented evidence proving that particular defendant guilty beyond a reasonable doubt.

(2) Your decision on one defendant, whether it is guilty or not guilty, should not influence your decision on any of the other defendants.

B. Authority:

Sixth Circuit Pattern Criminal Jury Instructions, 2021 Edition, Section 2.01B.

12. Definition of Crime Charged: RICO Conspiracy

A. Charge:

The indictment accuses the defendants of a conspiracy to commit racketeering (RICO Conspiracy). RICO Conspiracy occurs when an individual agrees or conspires with one or more other persons to conduct or to participate, directly or indirectly, in the conduct of an enterprise's affairs through a pattern of racketeering activity. You must consider each defendant independently to determine whether the elements of RICO Conspiracy are met as to that defendant.

A conspiracy is a kind of criminal partnership. For you to find either of the defendants guilty of RICO Conspiracy, the government must prove each and every one of the following elements beyond a reasonable doubt:

First, an enterprise existed as alleged in the indictment;

Second, the enterprise was engaged in or had some effect on interstate commerce;

Third, the defendant was associated with an enterprise;

Fourth, two or more people agreed to try to accomplish an unlawful plan to participate in the affairs of an enterprise through a pattern of racketeering activity;

Fifth, the defendant knowingly and willfully joined in the conspiracy; and

Sixth, when the defendant joined in the agreement, the Defendant had the specific intent either to personally participate in committing at least two other acts of racketeering, or else to participate in the enterprise's affairs, knowing that other members of the conspiracy would commit at least two other acts of racketeering and intending to help them as part of a pattern of racketeering activity.

You must be convinced that the government has proved all of these elements beyond a reasonable doubt in order to find the defendant guilty of RICO Conspiracy.

Next, I am going to discuss each of these requirements in detail.

B. Authority:

Sixth Circuit Pattern Criminal Jury Instructions, 2021 Edition, Sections 3.01A; Eighth Circuit Pattern Criminal Jury Instructions, Section 6.18.1962B; Eleventh Circuit Pattern Criminal Jury Instructions, Section O75.2. Defendants recognize that the Sixth Circuit has held, in a 2-1 decision, that when the government charges a RICO conspiracy, it need not prove the existence of the enterprise. *See United States v. Rich*, 14 F.4th 489, 493 (6th Cir. 2021). *But see id.* at 500 (Donald, J., dissenting) (explaining that the district court's instruction that the jury need only find that "an enterprise would exist" "eliminated the government's burden of proving a key element of the RICO conspiracy offense and allowed the government to convict multiple defendants based on potentially insufficient evidence"). As Judge Donald explained, the need for the government to prove the existence of an enterprise—as opposed to simply an agreement that an enterprise would be formed at some point in the future—flows from the Supreme Court's caselaw and from the structure of the RICO statute more generally. This reasoning is also in accord with other circuit courts of appeal. *See United States v. Browne*, 505 F.3d 1229, 1257 (11th Cir. 2007) (quoting *United States v. Starrett*, 55 F.3d 1525, 1541 (11th Cir.1995)).

In any event, this is all besides the point. The government alleged here in its indictment that the defendants "constituted an 'Enterprise' … as that term is defined in Title 18, United States Code, Section 1961(4)." (Doc. 22 ¶ 1). Thus, the government has alleged the existence of an enterprise. To instruct the jury otherwise—that is, that the government can prove its case by simply proving an agreement to form an enterprise—would constitute an impermissible variance of the indictment.

13. Prejudice from the Word "Racketeering"

A. Charge:

The word "racketeering" has certain implications in our society. Use of that term in this statute and in this courtroom should not be regarded as having anything to do with your determination of whether the guilt of this defendant has been proven. The term is only a term used by Congress to describe the statute.

B. Authority:

Tenth Circuit Pattern Criminal Jury Instructions, Section 2.74.1.

14. First Element: Existence of an "Enterprise"

A. Charge:

The first element that the government must prove beyond a reasonable doubt is the existence of an enterprise.

An enterprise includes any individual, partnership, corporation, association, or other legal entity, in any union or group of individuals associated in fact, although not a legal entity.

The term "enterprise," as used in these instructions, may include a group of people associated in fact, even though this association is not recognized as a legal entity. A group or association of people can be an enterprise if these individuals have joined together for the purpose of engaging in a common course of conduct. This group of people, in addition to having a common purpose, must have personnel who function as a continuing unit. This group of people does not have to be a legally recognized entity, such as a partnership or corporation. Such an association of individuals may retain its status as an enterprise even though the membership of the association changes by adding or losing individuals during the course of its existence.

If you find that this was, in fact, a legal entity such as a partnership, corporation, or association, then you may find that an enterprise existed.

The government must also prove that the association had a structure distinct from that necessary to conduct the pattern of racketeering activity

B. Authority:

Eighth Circuit Pattern Criminal Jury Instructions, Section 6.18.1962D.

15. Second Element: Effect on Interstate Commerce

A. Charge:

The second element the government must prove beyond a reasonable doubt is that the enterprise was engaged in or had an effect upon interstate commerce. Interstate commerce includes the movement of goods, services, money and individuals between states.

The government must prove that the enterprise engaged in interstate commerce or that its activities affected interstate commerce in any way, no matter how minimal. It is not necessary to prove that the acts of any particular defendant affected interstate commerce as long as the acts of the enterprise had such effect. Finally, the government is not required to prove that any defendant knew he was affecting interstate commerce.

B. Authority:

Tenth Circuit Pattern Criminal Jury Instruction, Section 2.74.4.

16. Third Element: Association with the Enterprise

A. Charge:

The third element the government must prove beyond a reasonable doubt is that the defendant was associated with the enterprise.

It is not required that the defendant have been associated with the enterprise for the entire time that the enterprise existed. It *is* required, however, that the government prove, beyond a reasonable doubt, that at *some* time during the period set forth in the indictment, the defendant was associated with the enterprise.

A person cannot be associated with an enterprise if he does not know of the enterprise's existence or the nature of its activities. Thus, in order to prove this element, the government must prove beyond a reasonable doubt that the defendant was connected to the enterprise in some meaningful way, and that the defendant knew of the existence of the enterprise and of the general nature of its activities.

B. Authority:

Tenth Circuit Pattern Criminal Jury Instruction, Section 2.76.4.

17. Fourth Element: Agreement to Participate in the Affairs of an Enterprise through a Pattern of Racketeering Activity

A. Charge:

The fourth element the government must prove beyond a reasonable doubt is that the defendant knowingly reached an agreement or understanding with at least one other person to participate, directly or indirectly, in the affairs of an enterprise through a pattern of racketeering activity.

This does not require proof of any formal agreement, written or spoken. Nor does this require proof that everyone involved agreed on all the details. But proof that people simply met together from time to time and talked about common interests, or engaged in similar conduct, is not enough to establish a criminal agreement. These are things that you may consider in deciding whether the government has proved an agreement. But without more they are not enough.

What the government must prove is that there was a mutual understanding, either spoken or unspoken, between two or more people, to cooperate with each other to commit the crime of Engaging in a Pattern of Racketeering Activity. This is essential.

An agreement can be proved indirectly, by facts and circumstances which lead to a conclusion that an agreement existed. But it is up to the government to convince you that such facts and circumstances existed in this particular case.

Next, I will address the "pattern of racketeering activity." The government has alleged that the pattern of racketeering activity was made up of the following five specific crimes:

B. Authority:

Sixth Circuit Pattern Criminal Jury Instructions, 2021 Edition, Section 3.02 (modified); Eighth Circuit Pattern Criminal Jury Instructions, 6.18.192B.

18. Fifth Element: Defendants' Connection to the Alleged Conspiracy

A. Charge:

The fifth element the government must prove beyond a reasonable doubt is that the defendants knowingly and voluntarily joined the criminal agreement. You must consider each defendant separately in this regard. To convict a defendant, the government must prove that he knew the conspiracy's main purpose(s), and that he voluntarily joined it intending to help advance or achieve its goals.

This does not require proof that a defendant knew everything about the conspiracy, or everyone else involved, or that he was a member of it from the very beginning. Nor does it require proof that a defendant played a major role in the conspiracy, or that his connection to it was substantial. A slight role or connection may be enough.

But proof that a defendant simply knew about a conspiracy, or was present at times, or associated with members of the group, is not enough, even if he approved of what was happening or did not object to it. Similarly, just because a defendant may have done something that happened to help a conspiracy does not necessarily make him a conspirator. These are all things that you may consider in deciding whether the government has proved that a defendant joined a conspiracy. But without more they are not enough.

A defendant's knowledge can be proved indirectly by facts and circumstances which lead to a conclusion that he knew the conspiracy's main purpose. But it is up to the government to convince you beyond a reasonable doubt that such facts and circumstances existed in this particular case.

B. Authority:

Sixth Circuit Pattern Criminal Jury Instructions, 2021 Edition, Section 3.03 (modified).

19. Sixth Element: Pattern of Racketeering Activity

A. Charge:

The sixth element the government must prove beyond a reasonable doubt is that the defendant engaged in a pattern of racketeering activity.

In order to establish a pattern of racketeering activity, the government must prove beyond a reasonable doubt that: (1) at least two acts of racketeering (list acts as detailed in the indictment and for which there is sufficient evidence) were committed within ten years of each other; (2) the racketeering acts had the same or similar purpose, results, participants, victims, or methods of commission; and (3) the racketeering acts themselves amount to or otherwise constitute a threat of continued activity.

Although a pattern of racketeering activity must consist of two or more acts, deciding that two such acts were committed, or planned to be committed, by itself may not be enough for you to find that a pattern exists.

Continued activity is sufficiently established when predicate acts can be attributed to a defendant operating as part of a long-term association that exists for criminal purposes or racketeering acts were a regular way of conducting the defendant's ongoing legitimate business.

The government need not prove that all acts described in the Indictment were committed, but you must unanimously find that the government proved beyond a reasonable doubt that the defendant committed (or agreed to commit or agreed would be committed by a conspirator) at least two acts of racketeering activity. It is not enough that some members of the jury find that a defendant committed two particular racketeering acts while other members of the jury find that the same defendant committed different racketeering acts. In order for you to find a defendant

guilty, there must be at least two specific racketeering acts that you all find were committed by that defendant (or that he agreed to commit or agreed a conspirator would commit).

I will now explain the elements of each type of racketeering activity that the government must prove beyond a reasonable doubt.

B. Authority:

Third Circuit Jury Instruction 6.18.1962C-8 (2021); Seventh Circuit Jury Instruction p.823 (2022); Eighth Circuit Jury Instruction 6.18.1962F (2021).

20. First Racketeering Act: Public Official Honest Services Wire Fraud

A. Charge:

The first racketeering act the government alleges is public official honest services wire fraud. For you to find the government proved this racketeering act, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

First, the defendant(s) voluntarily and intentionally devised a scheme to defraud the public of its right to the honest services of Larry Householder through bribery;

Second, the defendant(s) did so with the intent to defraud the public;

Third, the scheme to defraud involved a materially false or fraudulent pretense, representation, or promise, or the concealment of material information; and

Fourth, the defendant(s) used, or caused to be used, an interstate wire facility (identify the specific wire facility) in furtherance of, or in an attempt to carry out, some essential step in the scheme.

Now I will give you some more detailed instructions on some of these terms.

The phrase "scheme to defraud" as used in this instruction means any plan or course of action intended to deceive or cheat another out of the right to honest services where a bribe is paid in exchange for a specific official act. Because intent to defraud is an element of the crime, it follows that good faith on the part of the defendant is a complete defense to a charge of honest services wire fraud. A person who acts, or causes another person to act, on a belief or an opinion honestly held is not punishable under this statute merely because the belief or opinion turns out to be inaccurate, incorrect, or wrong. An honest mistake in judgment or an honest error in management does not rise to the level of criminal conduct. A defendant does not act in good faith

if, even though he honestly holds a certain opinion or belief, that defendant also knowingly makes false or fraudulent pretenses, representations, or promises to others. While the term "good faith" has no precise definition, it encompasses, among other things, a belief or opinion honestly held, an absence of malice or ill will, and an intention to avoid taking unfair advantage of another. The burden of proving good faith does not rest with the defendant because the defendant does not have any obligation to prove anything in this case. It is the government's burden to prove to you, beyond a reasonable doubt, that the defendant acted with an intent to defraud.

If the evidence in this case leaves you with a reasonable doubt as to whether the defendant acted with an intent to defraud or in good faith, then you must not consider this a racketeering activity for any defendant.

A bribe occurs when a person (who I will refer to as the "payor") has agreed to provide, or has actually provided, a thing (or things) of value to a public official in return for the public official agreeing to undertake, or undertaking, a specific official action. To satisfy this element, the government must prove that there was an explicit quid pro quo agreement. Quid pro quo is Latin, and it means "this for that" or "these for those." The government must prove that the quid pro quo agreement was *explicit*. In other words, the government must show that the contours of the proposed exchange were clearly understood by both the public official and the payor, even if the proposed exchange was not communicated between them in express terms. This explicit quid pro quo agreement must exist at the time that the bribe was paid; it cannot be formed later. The essential element of a bribe is therefore the *agreement* between a public official and a payor to *exchange* official acts for benefits to the official.

If you find that benefits were provided to Mr. Householder solely to cultivate goodwill or to nurture a relationship with him, and not in exchange for any specific official acts, then this

element will not have been proven, even if Mr. Householder later performed some act that was beneficial to the payor. Likewise, if you find that any benefits that may have been to Mr. Householder were provided in the hope of unspecified future assistance from him, and not in exchange for any official acts, then this element will not have been proven, even if Mr. Householder later performed some act that was beneficial to the payor.

The term "official act" means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit. This definition of official act has two parts.

First, the evidence must show a question, matter, cause, suit, proceeding or controversy that may at any time be pending or may by law be brought before a public official. A "question, matter, cause, suit, proceeding or controversy" must involve a formal exercise of governmental power, and it must be something specific and focused.

Second, the government must prove that the public official made a decision or took an action on that question or matter, or agreed to do so. The decision or action may include using an official position to exert pressure on another official to perform an official act. Actual authority over the end result is not controlling.

Under this definition, some acts do not count as "official acts." Setting up a meeting, calling another public official, or hosting an event does not, standing alone, qualify as an "official act."

The defendant need not have a direct role in the official act; an indirect role is sufficient.

A "thing of value" includes things possessing intrinsic value, whether tangible or intangible, that the person giving or offering, or the person soliciting or receiving, considers to be

worth something. A "thing of value" could include a campaign or 501(c)(4) contribution, so long as the contribution was solicited or received in exchange for specific official acts.

That said, while a campaign contribution to a 501(c)(4) organization could be a thing of value for purposes of establishing a bribe, not all campaign contributions are bribes. As a general matter, political contributions are a legitimate part of our system of privately financed elections. Absent an explicit quid pro quo agreement, donors are free to offer, and public officials are free to accept, donations that are motivated by a generalized hope that the donation may result in some form of favorable treatment. Likewise, a public official is free to solicit or accept contributions, even from persons who have business pending before the public official. Moreover, there is nothing inherently wrongful with a public official taking official acts that advance the interests of a contributor, even if those official acts occur shortly before or after the public official solicits or receives a contribution. But, if the public official has entered an explicit quid pro quo agreement, as that term was defined above, in soliciting or accepting such a contribution, or if the public official knows that the donor believes that the public official has entered such an agreement, then the contribution is a bribe. And, in deciding whether an explicit quid pro quo agreement exists, you may, but are not required to, consider whether the closeness in time between the solicitation or acceptance of the contribution, on the one hand, and the official act, on the other, gives rise to an inference that such an agreement exists.

If you are convinced that the government has proved all of these elements beyond a reasonable doubt, then you may consider this a racketeering activity committed by [insert defendant]. If you have a reasonable doubt about any one of these elements, then you must not consider this a racketeering activity for any defendant.

B. Authority:

Eleventh Circuit Jury Instruction O50.2 (2022); Eighth Circuit Jury Instruction p.400 (2021); Seventh Circuit Jury Instruction p.623; Sixth Circuit Pattern Criminal Jury Instructions, 2021 Edition, Section 10.04; Sixth Circuit Pattern Criminal Jury Instruction, 2021 Edition, Section 17.02 (2021); *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398 (1999); *Skilling v. United States*, 561 U.S. 358 (2010); *McDonnell v. United States*, 579 U.S. 550 (2016); *United States v. Lee*, 919 F.3d 340 (6th Cir. 2019); *United States v. Terry*, 707 F.3d 607 (6th Cir. 2013); Jury Instructions at 22-31, *United States v. Sittenfeld*, No. 1:20-cr-142 (S.D. Ohio July 6, 2022), ECF No. 202.

21. Second Racketeering Act: Private Sector Honest Services Wire Fraud

A. Charge:

The second racketeering act the government alleges is private sector honest services wire fraud. For you to find the government proved this racketeering act, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

First, the defendant(s) voluntarily and intentionally devised a scheme to defraud [name of employer] of its right to the honest services of [name of employee] through bribery;

Second, the defendant(s) intended for [name of employee] to breach a fiduciary duty owed to the [name of employer];

Third, the defendant(s) did so with the intent to defraud [name of employer];

Fourth, the defendant(s) foresaw or reasonably should have foreseen that [name of employer] might suffer economic harm as a result of the scheme; and

Fifth, the defendant(s) used, or caused to be used, an interstate wire facility (identify the specific wire facility) in furtherance of, or in an attempt to carry out, some essential step in the scheme.

Now I will you give more detailed instructions on some of these terms.

The phrase "scheme to defraud" as used in this instruction means any plan or course of action intended to deceive or cheat another out of the right to honest services where a bribe is paid in exchange for an official act. Because intent to defraud is an element of the crime, it follows that good faith on the part of the defendant is a complete defense to a charge of honest services wire fraud. A person who acts, or causes another person to act, on a belief or an opinion honestly held is not punishable under this statute merely because the belief or opinion turns out

to be inaccurate, incorrect, or wrong. An honest mistake in judgment or an honest error in management does not rise to the level of criminal conduct. A defendant does not act in good faith if, even though he honestly holds a certain opinion or belief, that defendant also knowingly makes false or fraudulent pretenses, representations, or promises to others. While the term "good faith" has no precise definition, it encompasses, among other things, a belief or opinion honestly held, an absence of malice or ill will, and an intention to avoid taking unfair advantage of another. The burden of proving good faith does not rest with the defendant because the defendant does not have any obligation to prove anything in this case. It is the government's burden to prove to you, beyond a reasonable doubt, that the defendant acted with an intent to defraud.

If the evidence in this case leaves you with a reasonable doubt as to whether the defendant acted with an intent to defraud or in good faith, then you must not consider this a racketeering activity for any defendant.

"Bribery" requires a quid pro quo—that is, a specific intent to give or receive something of value in exchange for an official act. It is not sufficient that a payment from the defendant(s) to the employee created an undisclosed conflict of interest or constituted undisclosed self-dealing by the employee.

An "official act" is a decision or action on a question, matter, suit, proceeding or controversy which must involve a formal exercise of the employee's position of employment or within the employee's job responsibilities and duties. A payment that does not entail a plan to change how the employee does his/her job is not a bribe. An official act does not include quitting or terminating the employment relationship.

"Breach of a fiduciary duty" includes the improper disclosure of "trade secrets" as defined by federal law. Breach of a fiduciary duty also includes the disclosure "confidential

business information" belonging to the employer where the employee was under an affirmative duty, such as under the terms of an employment contract, to not disclose the confidential business information.

"Trade secrets," under federal law, means all forms and types of financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing if— (A) the owner thereof has taken reasonable measures to keep such information secret; and (B) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information.

"Confidential business information" does not mean non-public information. Confidential business information means information that constitutes the employer's stock in trade and to be distributed and sold by the employer to those who will pay money for it, as for any other merchandise, and that the employee is under an affirmative duty, such as under the terms of an employment contract, not to improperly divulge.

Reasonably foreseeable economic harm means that the defendant(s) might reasonably have contemplated some concrete business harm to the employer stemming from the breach of the employee's fiduciary duty. Proof that the employer simply suffered only the loss of the loyalty and fidelity of the employee is insufficient.

If you are convinced that the government has proved all of these elements beyond a reasonable doubt, then you may consider this a racketeering activity committed by [insert

defendant]. If you have a reasonable doubt about any one of these elements, then you must not consider this a racketeering activity for any defendant.

B. Authority:

Eleventh Circuit Jury Instruction O50.3 (2022); Eighth Circuit Jury Instruction p.400 (2021); Seventh Circuit Jury Instruction p.623—630; Sixth Circuit Pattern Criminal Jury Instructions, 2021 Edition, Section 10.04; *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398 (1999); *Skilling v. United States*, 561 U.S. 358 (2010); *McDonnell v. United States*, 579 U.S. 550 (2016); *United States v. Lee*, 919 F.3d 340 (6th Cir. 2019); *United States v. Frost*, 125 F.3d 346 (6th Cir. 1997); *United States v. Hawkins*, 777 F.3d 880 (7th Cir. 2015); *United States v. Procter & Gamble Co.*, 47 F. Supp. 676 (D. Mass 1942); 18 U.S.C. § 1839(3); *Carpenter v. United States*, 484 U.S. 19 (1987); Doc. 104; Doc. 115.

22. Third Racketeering Act: Extortion Under Color of Official Right

A. Charge:

The third racketeering act the government alleges is extortion under color of official right. For you to find the government proved this racketeering act, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

First, that the defendant was a public official.

Second, that the defendant obtained property, that he was not lawfully entitled to, from another person with that person's consent.

Third, that the defendant knew the property was being obtained in exchange for an official act.

Fourth, that as a result, interstate commerce was affected in any way or degree.

Now I will give you more detailed instructions on some of these terms.

The term "public official" means a person with a formal employment relationship with government.

The term "property" means money or other tangible or intangible things of value that can be transferred.

The phrase "the defendant knew the property was being obtained received in exchange for an official act" must include the conduct of taking a bribe. Efforts to buy favor or generalized good will do not necessarily amount to bribery; bribery does not include gifts given in the hope that at some unknown, unspecified time, a public official might act favorably in the giver's interests. Gifts exchanged solely to cultivate friendship are not bribes; things of value given in friendship and without expectation of anything in return are not bribes. It is not a defense to

bribery that the public official would have done the official act anyway, even without the receipt of the property.

The term "official act" means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit. This definition of official act has two parts.

First, the evidence must show a question, matter, cause, suit, proceeding or controversy that may at any time be pending or may by law be brought before a public official. A "question, matter, cause, suit, proceeding or controversy" must involve a formal exercise of governmental power, and it must be something specific and focused.

Second, the government must prove that the public official made a decision or took an action on that question or matter, or agreed to do so. The decision or action may include using an official position to exert pressure on another official to perform an official act. Actual authority over the end result is not controlling.

Under this definition, some acts do not count as "official acts." Setting up a meeting, calling another public official, or hosting an event does not, standing alone, qualify as an "official act."

The defendant need not have a direct role in the official act; an indirect role is sufficient.

Conduct affects interstate commerce if it in any way interferes with or changes the movement of goods, merchandise, money, or other property in commerce between different states. Any effect at all on commerce is enough.

If you are convinced that the government has proved all of these elements beyond a reasonable doubt, then you may consider this a racketeering activity committed by [insert

defendant]. If you have a reasonable doubt about any one of these elements, then you must not consider this a racketeering activity for any defendant.

B. Authority:

Sixth Circuit Pattern Criminal Jury Instructions, 2021 Edition, Section 17.02.

Although the Supreme Court has held that Hobbs Act extortion under color of official right is "the 'rough equivalent of what we would now describe as 'taking a bribe,'" *Ocasio v. United States*, 578 U.S. 282, 285 (2016) (quoting *Evans v. United States*, 504 U.S. 255, 260 (1992)), multiple Justices have expressed misgivings with this holding, *see id.* at 300-01 (Breyer, J., concurring); *id.* at 301 (Thomas, J., dissenting, joined by Sotomayor, J.) ("In my view, the Court started down the wrong path in *Evans v. United States*, 504 U.S. 255 (1992), which wrongly equated extortion with bribery."); *Silver v. United States*, 141 S. Ct. 656, 656-57 (2021) (Gorsuch, J., dissenting from denial of cert.) ("Normally, extortion and bribery are treated as distinct crimes. In *Evans v. United States*, 504 U.S. 255 (1992), however, this Court conflated them for purposes of the Hobbs Act when a public official is the defendant. Chief Justice Rehnquist and Justices Scalia, Thomas, and Breyer have all questioned that judgment. I would have granted this case to reconsider *Evans* in light of these thoughtful criticisms.") (citations omitted). Defendants thus object to the Court giving this Sixth Circuit Pattern Instruction because extortion is not the same thing as bribery. But they acknowledge that the Supreme Court's holding in *Evans* binds this Court.

23. Fourth Racketeering Act: Travel in Aid of Racketeering

A. Charge:

The indictment accuses the defendants [or state particular defendant] committed Travel in Aid of Racketeering. In order to find [name] committed this act of racketeering activity, you must find beyond a reasonable doubt all of the following elements:

First, the defendant traveled in interstate commerce or used a (specify facility) in interstate commerce.

Second, the defendant traveled with the specific intent to promote, manage, establish or carry on an unlawful activity.

Third, while traveling, the defendant knowingly committed an act in performing or attempting to perform the unlawful activity.

Now I will give you some more detailed instructions on some of these terms.

The term "interstate commerce" means travel, transportation, or movement between one state and another state.

The term "facility" is broad and includes telephone systems, highways, banking systems, and the postal service. A facility in interstate commerce requires that the facility cross state lines.

The government must prove a reasonable doubt that the defendant was aware of the interstate travel or was aware that the facility in fact crossed state lines. For example, if a person in Ohio calls someone they know to be in California on the telephone, then that person knowingly used a facility in interstate commerce. It is not sufficient that the defendant simply used a facility, such a telecommunication system or highway. The defendant must have been aware that state lines were crossed.

The term "unlawful activity" means: [insert specified qualifying offense under 18 U.S.C. 1952(b)]

[Provide a more detailed explanation of the elements of the particular unlawful activity]

If you are convinced that the government has proved all of these elements beyond a reasonable doubt, then you may consider this a racketeering activity committed by [insert defendant]. If you have a reasonable doubt about any one of these elements, then you must not consider this a racketeering activity for any defendant.

[Eleventh Circuity Jury Instruction O71 (2022); *United States v. Alsobrook*, 620 F.2d 139, 143-44 (6th Cir. 1980)]

24. Fifth Racketeering Act: Money Laundering

A. Charge:

The fifth racketeering act the government alleges is conducting a financial transaction in violation of federal law. For you to find the government proved this racketeering act, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

First, that the defendant conducted a financial transaction.

Second, that the financial transaction involved property that represented the proceeds of [insert the specified unlawful activity from § 1956(c)(7)].

Third, that the defendant knew that the property involved in the financial transaction represented the proceeds from some form of unlawful activity.

Fourth, that the defendant knew that the transaction was designed in whole or in part to conceal or disguise the source of the proceeds of [insert the specified unlawful activity from § 1956(c)(7)]]

Now I will give you more detailed instructions on some of these terms.

The term "financial transaction" means (A) a transaction which in any way or degree affects interstate or foreign commerce (i) involving the movement of funds by wire or other means or (ii) involving one or more monetary instruments, or (iii) involving the transfer of title to any real property, vehicle, vessel, or aircraft, or (B) a transaction involving the use of a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree;.

The word "conducts" includes initiating, concluding, or participating in initiating or concluding a transaction.

The word "proceeds" means any property derived from, directly or indirectly, through some form of unlawful activity, including the gross receipts of such activity.

The phrase "knew that the property involved in a financial transaction represents the proceeds of some form of unlawful activity" means that the defendant knew the funds involved in the transaction represented the proceeds of some form, though not necessarily which form, of activity that constitutes a felony under state or federal law. The government does not have to prove the defendant knew the property involved represented proceeds of a felony as long as he knew the property involved represented proceeds of some form of unlawful activity.

If you are convinced that the government has proved all of these elements beyond a reasonable doubt, then you may consider this a racketeering activity committed by [insert defendant]. If you have a reasonable doubt about any one of these elements, then you must not consider this a racketeering activity for any defendant.

B. Authority:

Sixth Circuit Pattern Criminal Jury Instructions, 2021 Edition, Section 11.02.

25. Sixth Racketeering Act: Engaging in Monetary Transactions in Property Derived from Specified Unlawful Activity

A. Charge:

The sixth racketeering act the government alleges is engaging in a monetary transaction in violation of federal law. For you to find the government proved this racketeering act, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

First, that the defendant knowingly engaged in a monetary transaction.

Second, that the monetary transaction was in property derived from specified unlawful activity.

Third, that the property had a value greater than $10,000.

Fourth, that the defendant knew that the transaction was in criminally derived property.

Fifth, that the monetary transaction took place within the United States.

Now I will give you more detailed instructions on some of these terms.

The term "monetary transaction" means the deposit, withdrawal, transfer, or exchange, in or affecting interstate or foreign commerce, of funds or a monetary instrument by, through, or to a financial institution.

The term "specified unlawful activity" means public official honest services wire fraud, private sector honest services wire fraud, Hobbs Act extortion, travel in aid of racketeering, and bribery under Ohio law. I have already defined the elements of public official honest services wire fraud, private sector honest services wire fraud, Hobbs Act extortion, and travel in aid of racketeering for you. You should apply those definitions here. In a moment, I will define the elements of bribery under Ohio law for you. You should apply that definition here as well.

The term "criminally derived property" means any property constituting, or derived from, proceeds obtained from a criminal offense.

If you are convinced that the government has proved all of these elements beyond a reasonable doubt, then you may consider this a racketeering activity committed by [insert defendant]. If you have a reasonable doubt about any one of these elements, then you must not consider this a racketeering activity for any defendant.

B. Authority:

Sixth Circuit Pattern Criminal Jury Instructions, 2021 Edition, Section 11.06 (modified).

26. Seventh Racketeering Act: Bribery Under Ohio Law

A. Charge:

The seventh racketeering act the government alleges is bribery under Ohio law. To find the government has proven this racketeering act, you must find beyond a reasonable doubt that on or about the _____ day of _____, 20_____, and in _____ County, Ohio, the defendant, Larry Householder, knowingly solicited or accepted any valuable benefit to corrupt the discharge of his duty as a public servant, whether before or after the defendant was elected as a public servant.

A person acts knowingly, regardless of purpose, when the person is aware that the person's conduct will probably be of a certain nature. A person has knowledge of circumstances when the person is aware that such circumstances probably exist.

"Valuable benefit" includes a contribution. A "contribution" means a donation, payment, or transfer of funds by any person, which contribution is made, received, or used for the purpose of influencing the results of an election.

"To corrupt" means to destroy or undermine the honesty or integrity of another.

A "public servant" means any public official.

"Duty" means the obligation of a public servant in connection with his office.

"To solicit" means to seek, ask, influence, invite, tempt, lead on, or bring pressure to bear.

In sum, as with the First Racketeering Act (Public Official Honest Services Fraud), to prove this racketeering act, the government must prove an explicit quid pro agreement—that is, the government must show that the contours of the proposed exchange were clearly understood by both the public official and the payor, even if the proposed exchange was not communicated

between them in express terms. This explicit quid pro quo agreement must exist at the time that the bribe was paid; it cannot be formed later. The essential element of a bribe is therefore the *agreement* between a public official and a payor to *exchange* official acts for benefits to the official.

If you find that benefits were provided to Mr. Householder solely to cultivate goodwill or to nurture a relationship with him, and not in exchange for any specific official acts, then this element will not have been proven, even if Mr. Householder later performed some act that was beneficial to the payor. Likewise, if you find that any benefits that may have been to Mr. Householder were provided in the hope of unspecified future assistance from him, and not in exchange for any official acts, then this element will not have been proven, even if Mr. Householder later performed some act that was beneficial to the payor.

The term "official act" means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit. This definition of official act has two parts.

First, the evidence must show a question, matter, cause, suit, proceeding or controversy that may at any time be pending or may by law be brought before a public official. A "question, matter, cause, suit, proceeding or controversy" must involve a formal exercise of governmental power, and it must be something specific and focused.

Second, the government must prove that the public official made a decision or took an action on that question or matter, or agreed to do so. The decision or action may include using an official position to exert pressure on another official to perform an official act. Actual authority over the end result is not controlling.

Under this definition, some acts do not count as "official acts." Setting up a meeting, calling another public official, or hosting an event does not, standing alone, qualify as an "official act."

The defendant need not have a direct role in the official act; an indirect role is sufficient.

A "thing of value" includes things possessing intrinsic value, whether tangible or intangible, that the person giving or offering, or the person soliciting or receiving, considers to be worth something. A "thing of value" could include a campaign or 501(c)(4) contribution, so long as the contribution was solicited or received in exchange for specific official acts.

That said, while a campaign contribution to a 501(c)(4) organization could be a thing of value for purposes of establishing a bribe, not all campaign contributions are bribes. As a general matter, political contributions are a legitimate part of our system of privately financed elections. Absent an explicit quid pro quo agreement, donors are free to offer, and public officials are free to accept, donations that are motivated by a generalized hope that the donation may result in some form of favorable treatment. Likewise, a public official is free to solicit or accept contributions, even from persons who have business pending before the public official. Moreover, there is nothing inherently wrongful with a public official taking official acts that advance the interests of a contributor, even if those official acts occur shortly before or after the public official solicits or receives a contribution. But, if the public official has entered an explicit quid pro quo agreement, as that term was defined above, in soliciting or accepting such a contribution, or if the public official knows that the donor believes that the public official has entered such an agreement, then the contribution is a bribe. And, in deciding whether an explicit quid pro quo agreement exists, you may, but are not required to, consider whether the closeness

in time between the solicitation or acceptance of the contribution, on the one hand, and the official act, on the other, gives rise to an inference that such an agreement exists.

If you are convinced that the government has proved all of these elements beyond a reasonable doubt, then you may consider this a racketeering activity committed by [insert defendant]. If you have a reasonable doubt about any one of these elements, then you must not consider this a racketeering activity for any defendant.

B. Authority:

2 OJI-CR 521.02 (2022) (modified); *McCormick v. United States*, 500 U.S. 257, 272 (1991) ("Serving constituents and supporting legislation that will benefit the district and individuals and groups therein is the everyday business of a legislator. It is also true that campaigns must be run and financed. Money is constantly being solicited on behalf of candidates, who run on platforms and who claim support on the basis of their views and what they intend to do or have done. Whatever ethical considerations and appearances may indicate, to hold that legislators commit the federal crime of extortion when they act for the benefit of constituents or support legislation furthering the interests of some of their constituents, shortly before or after campaign contributions are solicited and received from those beneficiaries, is an unrealistic assessment of what Congress could have meant by making it a crime to obtain property from another, with his consent, 'under color of official right.' To hold otherwise would open to prosecution not only conduct that has long been thought to be well within the law but also conduct that in a very real sense is unavoidable so long as election campaigns are financed by private contributions or expenditures, as they have been from the beginning of the Nation.").

27. Not Here to Decide or Opine on Policy

A. Charge:

During the trial, you heard evidence regarding Ohio's energy policies, the funding of political campaigns, and non-disclosed contributions made to entities organized under section 501(c)(4) of the Internal Revenue Code. I want to caution you more generally that this case is not a referendum about energy policy in Ohio. Nor is it referendum about the funding of political campaigns or the disclosure (or non-disclosure) of political contributions. Some of you may find the private funding of political campaigns in this country to be flawed. It may be that you believe that political campaigns should not be privately funded, or that all political contributions should be publicly disclosed. You may have other beliefs about energy policy in this country or about the funding of political campaigns.

But that's not what this case is about. Your role as jurors in this case is to decide whether the government has met its burden to prove to you beyond a reasonable doubt that a particular criminal violation has been committed by one or more of the defendants. Whatever opinions you may hold about energy policy issues or campaign finance issues, those beliefs are not relevant to your impartial evaluation of the evidence in this case.

B. Authority:

The Court should make clear to the jury that its role is not provide its opinion about the various political issues at the heart of this case—political contributions and energy policy.

28. Campaign Contributions as Bribes/Defendants Not Charged with Campaign Finance Law Violations

A. Charge:

Campaign contributions to public officials, or to 501(c)(4) organizations with which a public official is associated, are generally protected by the First Amendment, unless they qualify as bribe payments. For campaign or 501(c)(4) contributions to qualify as bribe payments, they must be part of an explicit promise or understanding by the public official. This instruction governs when campaign contributions can be bribe payments relevant to the First and Seventh alleged Racketeering Acts.

For these alleged Racketeering Acts, acceptance by an elected official of a campaign contribution, or a contribution a 501(c)(4) organization, by itself, does not constitute bribery, even if the person making the contribution has business pending before the official. However, if a public official receives or obtains the contribution, or agrees to do so, knowing or believing that the contributor is giving the contribution in exchange for the public official undertaking or agreeing to undertake a specific requested exercise of his official powers, the public official has committed bribery, even though the money or property to be given to the official is in the form of a campaign or 501(c)(4) contribution.

Given the various testimony you have heard regarding campaign contributions and campaign finance law during the course of this trial, the Court further instructs you that the Indictment in this case does not charge the defendants with violating any campaign finance law. You should understand that in our system of privately funded political campaigns, candidates for office may solicit and accept contributions, including contributions to the 501(c)(4) in this case.

There also is nothing necessarily improper under campaign finance law about a candidate merely discussing his positions regarding an issue with a campaign contributor, including on the

same occasion as the candidate accepts a contribution or discusses campaign contributions. And there is not necessarily anything improper under campaign finance law about soliciting contributions from individuals or entities who have business pending before a political body on which the candidate serves or may serve. That said, as I have explained to you in much more detail in connection with the elements of the various alleged Racketeering Acts actually at issue in this case, if a candidate has entered an explicit quid pro quo agreement in exchange for a contribution, that may give rise to criminal liability under the charge at issue here.

B. Authority:

Jury Instructions at 44-47, *United States v. Sittenfeld*, No. 1:20-cr-142 (S.D. Ohio July 6, 2022), ECF No. 202.

29. On or About

A. Charge:

Next, I want to say a word about the dates mentioned in the indictment.

The indictment charges that the crime happened "on or about" certain days. The government does not have to prove that the crime happened on those exact days. But, the government must prove that the crime happened reasonably close to those dates.

B. Authority:

Sixth Circuit Pattern Criminal Jury Instructions, 2021 Edition, Section 2.04.

30. Inferring Required Mental State

A. Charge:

Next, I want to explain something about proving a defendant's state of mind.

Ordinarily, there is no way that a defendant's state of mind can be proved directly, because no one can read another person's mind and tell what that person is thinking.

But a defendant's state of mind can be proved indirectly from the surrounding circumstances. This includes things like what the defendant said, what the defendant did, how the defendant acted, and any other facts or circumstances in evidence that show what was in the defendant's mind.

You may also consider the natural and probable results of any acts that the defendant knowingly did or did not do, and whether it is reasonable to conclude that the defendant intended those results. This, of course, is all for you to decide.

B. Authority:

Sixth Circuit Pattern Criminal Jury Instructions, 2021 Edition, Section 2.08.

31. Defense Theory

A. Charge:

(1) That concludes the part of my instructions explaining the elements of the crime. Next I will explain the defendant's position.

(2) The defense says _____.

B. Authority:

Sixth Circuit Pattern Criminal Jury Instructions, 2021 Edition, Section 6.01.

32. Special Evidentiary Matters – Introduction

A. Charge:

That concludes the part of my instructions explaining the elements of the crime and the defendant's position. Next I will explain some rules that you must use in considering some of the testimony and evidence.

B. Authority:

Sixth Circuit Pattern Criminal Jury Instructions, 2019 Edition, Section 7.01.

33. Defendant's Election Not to Testify or Present Evidence

A. Charge:

(1) A defendant has an absolute right not to testify [or present evidence]. The fact that he did not testify [or present any evidence] cannot be considered by you in any way. Do not even discuss it in your deliberations.

(2) Remember that it is up to the government to prove the defendant guilty beyond a reasonable doubt. It is not up to the defendant to prove that they are innocent.

[Or, in the event the defendant testifies:]

Defendant's Testimony

(1) You have heard defendant _____ testify. Earlier, I talked to you about the "credibility" or the "believability" of the witnesses. And I suggested some things for you to consider in evaluating each witness's testimony.

(2) You should consider those same things in evaluating the defendant's testimony.]

B. Authority:

Sixth Circuit Pattern Criminal Jury Instructions, 2021 Edition, Sections 7.02A, 7.02B.

34. Opinion Testimony

A. Charge:

(1) You have heard the testimony of [expert names], who testified as an opinion witness.

(2) You do not have to accept any of those individuals' opinion. In deciding how much weight to give each opinion witness's testimony, you should consider the witness's qualifications and how he reached his conclusions. Also consider the other factors discussed in these instructions for weighing the credibility of witnesses.

(3) Remember that you alone decide how much of a witness' testimony to believe, and how much weight it deserves.

B. Authority:

Sixth Circuit Pattern Criminal Jury Instructions, 2019 Edition, Section 7.03.

35. Impeachment by Prior Inconsistent Statement Not Under Oath

A. Charge:

(1) You have heard the testimony of _____. You have also heard that before this trial he made a statement that may be different from his testimony here in court.

(2) This earlier statement was brought to your attention only to help you decide how believable his testimony was. You cannot use it as proof of anything else. You can only use it as one way of evaluating his testimony here in court.

A. Charge:

Sixth Circuit Pattern Criminal Jury Instructions, 2021 Edition, Section 7.04.

36. Testimony of a Paid Informant

A. Charge:

(1) You have heard the testimony of _____. You have also heard that he received money [or _____] from the government in exchange for providing information.

(2) The use of paid informants is common and permissible. But you should consider _____'s testimony with more caution than the testimony of other witnesses. Consider whether his testimony may have been influenced by what the government gave him.

(3) Do not convict the defendant based on the unsupported testimony of such a witness, standing alone, unless you believe his testimony beyond a reasonable doubt.

B. Authority:

Sixth Circuit Pattern Criminal Jury Instructions, 2021 Edition, Section 7.06A.

37. Testimony of a Witness Under Grant of Immunity or Reduced Criminal Liability

A. Charge:

(1) You have heard the testimony of _____. You have also heard that the government has promised him that [he will not be prosecuted for _____] [he will _____] in exchange for his cooperation.

(2) It is permissible for the government to make such a promise. But you should consider _____'s testimony with more caution than the testimony of other witnesses. Consider whether his testimony may have been influenced by the government's promise.

(3) Do not convict the defendant based on the unsupported testimony of such a witness, standing alone, unless you believe his testimony beyond a reasonable doubt.

B. Authority:

Sixth Circuit Pattern Criminal Jury Instructions, 2021 Edition, Section 7.07.

38. Testimony of a Witness Under Compulsion

A. Charge:

(1) You have heard that the court compelled the testimony of _____. You have also heard that his testimony cannot be used against him by the government except in a prosecution for perjury.

(2) You should consider _____'s testimony with more caution than the testimony of other witnesses. Consider whether his testimony may have been influenced by this grant of immunity.

(3) Do not convict any of the defendants based on the unsupported testimony of such a witness, standing alone, unless you believe that testimony beyond a reasonable doubt.

B. Authority:

Sixth Circuit Pattern Criminal Jury Instructions, 2021 Edition, Section 7.07A.

39. Summaries and Other Materials Not Admitted in Evidence

A. Charge:

During the trial you have seen counsel use [summaries, charts, drawings, calculations, or similar material] which were offered to assist in the presentation and understanding of the evidence. This material is not itself evidence and must not be considered as proof of any facts.

B. Authority:

Sixth Circuit Pattern Criminal Jury Instructions, 2021 Edition, Section 7.12.

40. Secondary-Evidence Summaries Admitted in Evidence

A. Charge:

(1) During the trial you have seen or heard summary evidence in the form of [a chart, drawing, calculation, testimony, or similar material]. This summary was admitted in evidence, in addition to the material it summarizes, because it may assist you in understanding the evidence that has been presented.

(2) But the summary itself is not evidence of the material it summarizes, and is only as valid and reliable as the underlying material it summarizes.

B. Authority:

Sixth Circuit Pattern Criminal Jury Instructions, 2021 Edition, Section 7.12A.

41. Other Acts of Defendant (if necessary)

A. Charge:

(1) You have heard testimony that the defendant committed [crimes, acts, wrongs] other than the ones charged in the indictment. If you find the defendant did those [crimes, acts, wrongs], you can consider the evidence only as it relates to the government's claim on the defendant's [intent] [motive] [opportunity] [preparation] [plan] [knowledge] [identity] [absence of mistake] [absence of accident]. You must not consider it for any other purpose.

(2) Remember that the defendant is on trial here only for _____, not for the other acts. Do not return a guilty verdict unless the government proves the crime charged in the indictment beyond a reasonable doubt.

B. Authority:

Sixth Circuit Pattern Criminal Jury Instructions, 2021 Edition, Section 7.13.

42. Transcriptions of Recordings

A. Charge:

(1) You have heard some recorded conversations that were received in evidence, and you were shown some written transcripts of the recordings.

(2) Keep in mind that the transcripts are not evidence. They were shown to you only as a guide to help you follow what was being said. The recordings themselves are the evidence. If you noticed any differences between what you heard on the recordings and what you read in the transcripts, you must rely on what you heard, not what you read. And if you could not hear or understand certain parts of the recordings, you must ignore the transcripts as far as those parts are concerned.

B. Authority:

Sixth Circuit Pattern Criminal Jury Instructions, 2021 Edition, Section 7.17 (modified).

43. Separate Consideration—Evidence Admitted Against Certain Defendants Only

A. Charge:

(1) You have heard testimony from _____ that _____.

(2) You can only consider this testimony against _____ in deciding whether the government has proved him guilty. You cannot consider it in any way against any of the other defendants.

B. Authority:

Sixth Circuit Pattern Criminal Jury Instructions, 2021 Edition, Section 7.18.

44. Judicial Notice

A. Charge:

I have decided to accept as proved the fact that _____, even though no evidence was presented on this point. You may accept this fact as true, but you are not required to do so.

B. Authority:

Sixth Circuit Pattern Criminal Jury Instructions, 2021 Edition, Section 7.19.

45. Stipulations

A. Charge:

The government and the defendants have agreed, or stipulated, to certain facts. Therefore, you must accept the following stipulated facts as proved: [insert facts stipulated].

B. Authority:

Sixth Circuit Pattern Criminal Jury Instructions, 2021 Edition, Section 7.21.

46. Deliberation and Verdict – Introduction

A. Charge:

(1) That concludes the part of my instructions explaining the rules for considering some of the testimony and evidence. Now let me finish up by explaining some things about your deliberations in the jury room, and your possible verdicts.

(2) The first thing that you should do in the jury room is choose someone to be your foreperson. This person will help to guide your discussions, and will speak for you here in court.

(3) Once you start deliberating, do not talk to the jury officer, or to me, or to anyone else except each other about the case. If you have any questions or messages, you must write them down on a piece of paper, sign them, and then give them to the jury officer. The officer will give them to me, and I will respond as soon as I can. I may have to talk to the lawyers about what you have asked, so it may take me some time to get back to you. Any questions or messages normally should be sent to me through your foreperson.

(4) If you want to see any of the exhibits that were admitted in evidence, you may send me a message, and those exhibits will be provided to you.

(5) One more thing about messages. Do not ever write down or tell anyone, including me, how you stand on your votes. For example, do not write down or tell anyone that you are split 6-6, or 8-4, or whatever your vote happens to be. That should stay secret until you are finished.

B. Authority:

Sixth Circuit Pattern Criminal Jury Instructions, 2021 Edition, Section 8.01

47. Experiments, Research, Investigation and Outside Communications

A. Charge:

Remember that you must make your decision based only on the evidence that you saw and heard here in court.

During your deliberations, you must not communicate with or provide any information to anyone by any means about this case. You may not use any electronic device or media or application, such as a telephone, cell phone, smart phone, iPhone, Blackberry, or computer, the Internet, any Internet service, or any text or instant messaging service, any Internet chat room, blog, or website such as Facebook, MySpace, LinkedIn, YouTube, Twitter, Instagram, WhatsApp, Snapchat or other similar electronic service, to communicate to anyone any information about this case or to conduct any research about this case until I accept your verdict. In other words, you cannot talk to anyone on the phone, correspond with anyone, or electronically communicate with anyone about this case. You can only discuss the case in the jury room with your fellow jurors during deliberations. I expect you will inform me as soon as you become aware of another juror's violation of these instructions.

You may not use these electronic means to investigate or communicate about the case because it is important that you decide this case based solely on the evidence presented in this courtroom. Information on the Internet or available through social media might be wrong, incomplete, or inaccurate. Even using your smartphones, tablets, and computers -- and the news and social media apps on those devices -- may inadvertently expose you to certain notices, such as pop-ups or advertisements, that could influence your consideration of the matters you've heard about in this courtroom. You are only permitted to discuss the case with your fellow jurors during deliberations because they have seen and heard the same evidence you have. In our

judicial system, it is important that you are not influenced by anything or anyone outside of this courtroom. Otherwise, your decision may be based on information known only by you and not your fellow jurors or the parties in the case. This would unfairly and adversely impact the judicial process. A juror who violates these restrictions jeopardizes the fairness of these proceedings, and a mistrial could result, which would require the entire trial process to start over.

B. Authority:

Sixth Circuit Pattern Criminal Jury Instructions, 2021 Edition, Section 8.02.

48. Unanimous Verdict

A. Charge:

(1) Your verdict, whether it is guilty or not guilty, must be unanimous.

(2) To find a defendant guilty, every one of you must agree that the government has overcome the presumption of innocence with evidence that proves their guilt beyond a reasonable doubt.

(3) To find him not guilty, every one of you must agree that the government has failed to convince you beyond a reasonable doubt.

(4) Either way, guilty or not guilty, your verdict must be unanimous.

B. Authority:

Sixth Circuit Pattern Criminal Jury Instructions, 2019 Edition, Section 8.03.

49. Unanimity Required

A. Charge:

One more point about the requirement that your verdict must be unanimous. The indictment alleges that each defendant committed, agreed to commit, or agreed a conspirator would commit (state number of) acts of racketeering activity. As I have instructed, you must find that the government proved beyond a reasonable doubt that each defendant committed at least two of the alleged acts of racketeering activity within the prescribed time period.

You must unanimously find that the government proved beyond a reasonable doubt that each defendant committed at least two of the same particular acts of racketeering activity alleged. It is not enough that some members of the jury find that a defendant committed two of the particular racketeering acts alleged while other members of the jury find that the same defendant committed different racketeering acts. In order for you to find a defendant guilty, there must be at least two specific racketeering acts that all of you find were committed by that defendant.

B. Authority:

Third Circuit Pattern Criminal Jury Instructions, Section 6.18.1962C-8. Defendants recognize that the Sixth Circuit has held that when the government charges a RICO conspiracy "unanimity [i]s not required as to the particular racketeering acts." *United States v. Rios*, 830 F.3d 403, 434 (6th Cir. 2016). But the Sixth Circuit has noted that the jury must be unanimous "'as to the *types* of predicate racketeering acts' that someone would commit." *United States v. Wilson*, 579 F. App'x 338, 347 (6th Cir. 2014) (quoting *United States v. Randall*, 661 F.3d 1291, 1299 (10th Cir. 2011)). Thus, even if the Court does not instruct the jury that it must unanimously decide which racketeering acts the defendants committed (or agreed would be

committed), the Court must instruct that the jury they must unanimously agree on which ***types*** of racketeering acts the defendants agreed would be committed. *See* Third Circuit Pattern Criminal Jury Instructions, Section 6.18.1962D ("Moreover, in order to convict (name) of the RICO conspiracy offense, your verdict must be unanimous as to which type or types of racketeering activity (name) agreed would be committed …").

50. Duty to Deliberate

A. Charge:

(1) Now that all the evidence is in and the arguments are completed, you are free to talk about the case in the jury room. In fact, it is your duty to talk with each other about the evidence, and to make every reasonable effort you can to reach unanimous agreement. Talk with each other, listen carefully and respectfully to each other's views, and keep an open mind as you listen to what your fellow jurors have to say. Try your best to work out your differences. Do not hesitate to change your mind if you are convinced that other jurors are right and that your original position was wrong.

(2) But do not ever change your mind just because other jurors see things differently, or just to get the case over with. In the end, your vote must be exactly that—your own vote. It is important for you to reach unanimous agreement, but only if you can do so honestly and in good conscience.

(3) No one will be allowed to hear your discussions in the jury room, and no record will be made of what you say. So you should all feel free to speak your minds.

(4) Listen carefully to what the other jurors have to say, and then decide for yourself if the government has proved the defendant guilty beyond a reasonable doubt.

B. Authority:

Sixth Circuit Pattern Criminal Jury Instructions, 2021 Edition, Section 8.04.

51. Punishment

A. Charge:

(1) If you decide that the government has proved the defendant guilty, then it will be my job to decide what the appropriate punishment should be.

(2) Deciding what the punishment should be is my job, not yours. It would violate your oaths as jurors to even consider the possible punishment in deciding your verdict.

(3) Your job is to look at the evidence and decide if the government has proved the defendant guilty beyond a reasonable doubt.

B. Authority:

Sixth Circuit Pattern Criminal Jury Instructions, 2021 Edition, Section 8.05.

52. Verdict Forms

A. Charge:

(1) I have prepared verdict forms that you should use to record your verdicts. The forms read as follows: _____.

(2) If you decide that the government has proved the charges against the defendant beyond a reasonable doubt, say so by having your foreperson mark the appropriate place on the forms. If you decide that the government has not proved the charges against him beyond a reasonable doubt, say so by having your foreperson mark the appropriate place on the forms. Each of you should then sign the forms, put the date on it, and return it to me.

B. Authority:

Sixth Circuit Pattern Criminal Jury Instructions, 2021 Edition, Section 8.06.

53. Verdicts Limited to Charge against the Defendants

A. Charge:

(1) Remember that the defendants are only on trial for the particular crime charged in the indictment. Your job is limited to deciding whether the government has proved the crimes charged.

(2) Also remember that whether anyone else should be prosecuted and convicted for this crime is not a proper matter for you to consider. The possible guilt of others is no defense to a criminal charge. Your job is to decide if the government has proved these defendants guilty. Do not let the possible guilt of others influence your decision in any way.

B. Authority:

Sixth Circuit Pattern Criminal Jury Instructions, 2021 Edition, Section 8.08.

54. Court Has No Opinion

A. Charge:

Let me finish up by repeating something that I said to you earlier. Nothing that I have said or done during this trial was meant to influence your decision in any way. You decide for yourselves if the government has proved the defendant guilty beyond a reasonable doubt.

B. Authority:

Sixth Circuit Pattern Criminal Jury Instructions, 2021 Edition, Section 8.09.

55. Juror Notes

A. Charge:

(1) Remember that if you elected to take notes during the trial, your notes should be used only as memory aids. You should not give your notes greater weight than your independent recollection of the evidence. You should rely upon your own independent recollection of the evidence or lack of evidence and you should not be unduly influenced by the notes of other jurors. Notes are not entitled to any more weight than the memory or impression of each juror.

(2) Whether you took notes or not, each of you must form and express your own opinion as to the facts of the case.

B. Authority:

Sixth Circuit Pattern Criminal Jury Instructions, 2021 Edition, Section 8.10.